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No. 00-730

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL ASSOCIATION OF MINORITY CONTRACTORS, NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL, INC., AND LATIN AMERICAN MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

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INTEREST OF THE *AMICI CURIAE*

Amici are nonprofit organizations devoted to helping minority-owned businesses participate fully in the mainstream of American economic life. As courts and legislatures throughout the country have found, a long-standing pattern and practice of racial discrimination by unions, trade associations, banks, bonding companies, and government agencies has greatly hindered the formation and success of minority-owned businesses and continues to do so today. Many of the minority-owned businesses *amici* represent have benefited from programs instituted at the federal, state, and local levels to remedy this discrimination. *Amici* strongly believe that such programs are a limited but vital step in reducing the competitive disadvantages minority-owned businesses face as a result of discrimination in the marketplace. Because this Court's decision will have a profound impact on the future viability of hundreds of remedial programs throughout the country, *amici* wish to present their views concerning the constitutionality of the Disadvantaged Business Enterprise ("DBE") program at issue in this case.[1]

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs. MBELDEF has participated as an *amicus curiae* throughout this litigation, in both the District Court and the Tenth Circuit, and filed a brief in *Adarand*

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

Constructors, Inc. v. Pena, 515 U.S. 200 (1995), when this case was first before the Court.

The National Association of Minority Contractors ("NAMC") is a nonprofit corporation founded in 1969. During its 32 years of service, NAMC's goals have been to provide education and training to minority contractors, to promote the economic and legal interests of minority construction firms, and to bring equitable procurement and business opportunities to its members.

The National Minority Supplier Development Council, Inc. ("NMSDC") is a nonprofit corporation founded in 1969 that seeks to provide minority businesses with access to purchasing opportunities in the public and private sectors. Currently, NMSDC has 46 regional offices and a national office that coordinate these efforts on a local and national level.

The Latin American Management Association ("LAMA") is a nonprofit business league founded in 1972. For the past 29 years, LAMA has continuously focused its attention on procuring prime contract opportunities for Hispanic and minority firms at the federal, state, and local levels and has actively promoted minority business opportunity programs.

SUMMARY OF ARGUMENT

When Congress acts to remedy racial discrimination, it stands on special constitutional footing. This is the clear import of Section Five of the Fourteenth Amendment, which expressly authorizes Congress "to enforce" the Amendment "by appropriate legislation." U.S. Const. amend. XIV, § 5. This enforcement power includes not just the authority to adopt laws prohibiting invidious discrimination, but also "the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion).

Congress' Section Five power does not, of course, exempt federal laws from the stringent constitutional review applied to racial classifications generally. As the Court's first decision in this case made clear, race-conscious laws are subject to strict scrutiny irrespective of whether they spring from the exercise of federal or state power. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Accordingly, Congress, like its state and local counterparts, may draw racial classifications only if they are narrowly tailored to serve a compelling governmental interest. *Id.* In applying this standard to a race-conscious federal law enacted under Section Five, however, the Court must give "great weight" to Congress' judgment that the law is needed to redress racial discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion). For there can be no question that remedying the effects of racial discrimination constitutes a compelling governmental interest, *see Adarand*, 515 U.S. at 237, and such remedial efforts lie at the heart of Congress' power under Section Five. To subject congressional findings of discrimination and the need for remedial action to an overly "stringent standard of review would impinge upon Congress' ability to address problems of discrimination." *Fullilove*, 448 U.S. at 503 n.4 (Powell, J., concurring).

In order to respect Congress' Section Five power while subjecting its enactments to the "detailed judicial inquiry" required for race-based classifications, *Adarand*, 515 U.S. at 229, the Court should hold that "a reasonable congressional finding of discrimination" is sufficient to satisfy the compelling-interest prong of strict scrutiny. *See Fullilove*, 448 U.S. at 503 n.4 (Powell, J., concurring). This standard is plainly met here. When Congress re-enacted the Disadvantaged Business Enterprise ("DBE") program in 1998, the evidence before it demonstrated that decades of antidiscrimination law enforcement had failed to rid the construction industry of racial discrimination. Congress

chose to continue its race-conscious remedial efforts, and it had ample basis for doing so.

Nor can there be any question that the DBE program is narrowly tailored. The DBE program does not establish a quota or any other one-size-fits-all remedy in which race is the "sole criterion" in the allocation of public-sector construction contracts. *Cf. Croson*, 488 U.S. at 493. To the contrary, the DBE program establishes a limited and flexible remedial scheme, one that takes into account the particular circumstances surrounding individual public contracts. The program sets only aspirational goals for minority business participation, and requires recipients of federal funds to set market-sensitive participation goals. If recipients fail to meet these goals, no penalty attaches. Indeed, recipients may not even consider race until they have exhausted all race-neutral means of increasing DBE participation.

When it first considered petitioner's challenge to the DBE program, this Court took pains to "dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (citation and internal quotation marks omitted). The DBE program is a modest and flexible effort to remedy a problem for which Congress had abundant evidence. If the Court's characterization of strict scrutiny is to have any meaning, and if Congress' Section Five power is to have any force in this context, the DBE program must be upheld.

ARGUMENT

I. CONGRESS HAD A COMPELLING INTEREST IN RE-ENACTING THE DBE PROGRAM AS A REMEDY FOR RACIAL DISCRIMINATION WITHIN THE NATION'S CONSTRUCTION INDUSTRY.

Two decades ago, this Court determined, in the same factual context involved here, that Congress had sufficient evidence of racial discrimination in the Nation's construction

industry to conclude that race-conscious remedial action was warranted. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court examined in detail the legislative record supporting passage of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, which required that 10% of the funds appropriated for local public works projects be used to purchase goods or services from minority-owned businesses. The Court found that "Congress had before it . . . evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises." *Id.* at 478 (plurality opinion); *see id.* at 520 (Marshall, J., concurring in judgment). This disparity, the evidence showed, "result[ed] not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination." *Id* at 478 (plurality opinion). Although much of the evidence in the legislative record pertained to federal procurement contracting, the Court also found that "there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well." *Id* The Court therefore held that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," and that race-conscious remedial measures were therefore permissible. *Id.*; *see id.* at 520 (Marshall, J., concurring in judgment).

Congress relied on the same history of discrimination in public-sector contracting, and the same interest in remedying the effects of that discrimination, when it re-enacted the DBE program in 1998, as well as extensive new evidence that has emerged in the two decades following *Fullilove*. For three reasons, this evidence is more than adequate to show that Congress acted in furtherance of a compelling governmental interest here. First, the Court's subsequent decision in

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), left undisturbed *Fullilove*'s analysis of the legislative record before Congress, in the course of which the Court accorded considerable weight to Congress' findings of racial discrimination in the construction industry. Second, *Fullilove*'s teaching that congressional findings are entitled to considerable weight finds strong support in Section Five of the Fourteenth Amendment. Finally, the evidence before Congress in 1998 demonstrated that racial discrimination in the construction industry remains sufficiently pervasive to justify continued use of race-conscious remedial action.

A. Congress' Findings of Racial Discrimination Are Entitled to Considerable Deference.

This Court's decision in *Adarand* decided a narrow legal question, albeit one with broad import: whether the federal government's use of racial classifications, even for concededly benign purposes, must be subjected to strict scrutiny. The Court held that race-conscious laws enacted by the federal government, like those enacted by state and local governments, must be analyzed under strict scrutiny and thus are constitutional "only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. The Court expressly overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had held that "'benign' federal racial classifications need only satisfy intermediate scrutiny." *Adarand*, 515 U.S. at 225, 227.

The Court notably did not purport to overrule *Fullilove*, nor, in light of the Court's holding in *Adarand*, was there any basis for doing so. Although the plurality in *Fullilove* declined to adopt either strict or intermediate scrutiny as the appropriate standard of review, it expressly stated that the federal race-conscious legislation at issue there "would survive judicial review under either 'test.'" 448 U.S. at 492. And, as the Court noted in *Adarand*, Justice Powell, who

joined the plurality opinion, "express[ed] his view that the plurality had essentially applied 'strict scrutiny.'" 515 U.S. at 219. It is true that the three Justices who concurred in the judgment in *Fullilove* (Justice Marshall, joined by Justices Brennan and Blackmun), upheld the 10% set-aside under intermediate scrutiny, since they viewed remedying the "present effects of past racial discrimination [as] a sufficiently important governmental interest to justify the use of racial classifications." *Fullilove*, 448 U.S. at 520 (Marshall, J., concurring in judgment). But this Court has long held, and indeed reaffirmed in *Adarand*, 515 U.S. at 237, that remedying the effects of racial discrimination constitutes not merely an important but a *compelling* governmental interest. Thus, the only sense in which *Adarand* might have required a different analysis from that applied in *Fullilove* concerns the tightness of the "fit" between means and end that the three Justices who concurred in the judgment demanded. The Court left undisturbed *Fullilove*'s analysis of the congressional findings that supported use of the 10% set-aside as a remedy for racial discrimination within the Nation's construction industry.

As *Fullilove* makes clear, Congress' decision to take race-conscious remedial action is entitled to considerable weight. In gauging whether Congress' action furthers a compelling governmental interest, the Court must determine whether Congress "reasonably concluded" that the practice and lingering effects of racial discrimination in a given industry are still prevalent. *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). As Justice Powell noted, "a reasonable congressional finding of discrimination" is sufficient under strict scrutiny, because any "more stringent standard of review would impinge upon Congress' ability to address problems of discrimination." *Id.* at 503 n.4. This standard is consistent with the Court's approach to review of congressional findings in other contexts. For example, in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180

(1997), the Court held that even when First Amendment rights are implicated, the Constitution "gives to Congress the role of weighing conflicting evidence in the legislative process," and thus congressional findings are owed "considerable deference." *Id.* at 199-200. And, in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982), the Court rejected a First Amendment challenge to a campaign-finance statute, stating that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210.

B. Section Five of the Fourteenth Amendment Affords Congress Broad and Unique Powers to Remedy the Effects of Racial Discrimination.

Fullilove's standard of review for congressional findings of discrimination is supported not only by the weight accorded Congress' findings of fact in general, but also by the "unique remedial powers" conferred on Congress by Section Five of the Fourteenth Amendment. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (plurality opinion). Section Five, this Court has held, "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). That power encompasses the discretion to implement race-conscious measures when Congress concludes that such measures are "reasonably necessary to the redress of identified discrimination." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring). Thus, just as Congress' determination that discrimination exists is entitled to substantial weight, so too is its judgment that broad prohibitions on the practice of racial discrimination have proved insufficient to ameliorate the lingering effects of such discrimination. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that Congress is "entitled to much deference" when it concludes that legislation is needed to safeguard Fourteenth Amendment guarantees).

The "considerable latitude" Congress enjoys when exercising its Section Five powers, *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting), is even broader than the discretion federal courts possess when fashioning decrees to remedy racial discrimination. Yet this Court has upheld judicially imposed remedies far more race-conscious than the congressionally enacted DBE program at issue here. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), for example, the Court affirmed a decree mandating student reassignment and busing solely on the basis of race as a means of achieving greater racial balance in a still-segregated school system. *See also United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) (mandating a fixed ratio of black and white teachers at each school as a remedy for past discrimination). The Court has also upheld similarly race-conscious court orders as a means of integrating unions and workplaces that excluded minorities in violation of Title VII. *See United States v. Paradise*, 480 U.S. 149, 153, 167 (1987) (plurality opinion) (upholding temporary, court-imposed "one-black-for-one-white" promotion requirement); *id.* at 189 (Stevens, J., concurring in judgment); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 474 (1986) (plurality opinion) (upholding court-ordered requirement that minorities comprise 29% of union's membership by certain date); *id.* at 483 (Powell, J., concurring in part and concurring in judgment).

The Court concluded in these cases that merely prohibiting the practice of racial discrimination had not proved sufficient to remedy the effects of past discrimination, and that judicial imposition of affirmative race-conscious relief was therefore warranted. Congress possesses even broader power to make such judgments under Section Five of the Fourteenth Amendment. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress,

expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483 (plurality opinion).

Affording deference to congressional findings of discrimination is in no way inconsistent with *Adarand*'s extension of strict scrutiny to federal race-conscious measures. Congress has a "unique constitutional role" in finding and remedying racial discrimination, *Fullilove*, 448 U.S. at 516 (Powell, J., concurring), and its laws are not properly subject to the kind of second-guessing applied to legislative findings made by state legislatures, *cf. Croson*, 488 U.S. at 490-93 (plurality opinion). That is because Congress, "unlike a State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. State and local laws that rely on racial classifications presumptively conflict with Section One of the Fourteenth Amendment, whose very ratification "stemmed from a distrust of state legislative enactments based on race." *Id.* at 491. Section Five, in contrast, affirmatively grants Congress *authority* to enact race-conscious measures when such measures are necessary to remedy the effects of racial discrimination. *See Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (explaining that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress").

In holding that federal and state race-conscious measures are both subject to strict scrutiny, *Adarand* neither repudiated the constitutionally inscribed difference between state and federal legislatures, nor "contravene[d] any principle of appropriate respect for a coequal branch of the Government." *Adarand*, 515 U.S. at 230. For this reason, when Congress acts pursuant to its Section Five powers, as it clearly has here, its findings of discrimination are entitled to greater deference than those made by state and local governments. *See Fullilove*, 448 U.S. at 515 n.14 (Powell, J., concurring) ("The

degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.").

It is all the more proper to defer to congressional findings of discrimination when, as in this case, Congress' chosen remedy is so modest that it plainly satisfies the constitutional requirement of narrow tailoring. *See City of Erie v. PAP's A.M.*, 529 U.S. 277, 311 n.1, 312-13 (2000) (Souter, J., concurring in part and dissenting in part) (explaining that "[a] lesser showing may suffice when the means-end fit is evident to the untutored intuition," and applying this principle to the evidence advanced by the government in support of its asserted interest). Were a legislature to adopt a race-conscious remedy that appears, at first look, far more expansive than necessary to address the identified discrimination, it may be appropriate for a court to question whether the finding of discrimination is truly supportable or is being used as justification for accomplishing a different legislative agenda. In that circumstance, it may make sense to require the legislature to support its conclusion that remedial action is warranted with detailed and specific evidence. *Cf. Croson*, 488 U.S. at 493 (plurality opinion). But where, as here, the legislature adopts a race-conscious remedy that on its face focuses narrowly on the discrimination that has been identified, the actual purpose served by the law is likely to be apparent. In such circumstances, the legislature should be permitted to rely upon less-detailed evidence of discrimination. *Cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

As discussed below (*see* Section II.A, *infra*), the DOT's revised DBE program represents a carefully limited step toward ending racial discrimination in public contracting.

Unlike the program invalidated in *Croson*, the revised DBE program does not make race a dispositive factor in the allocation of public contracts. Rather, the program requires state and local governments to consider race only in a limited and flexible fashion. Because the DBE program on its face is narrowly tailored to the problem of racial discrimination in public contracting, it must be upheld so long as Congress' finding of systemic discrimination was reasonable.

C. Congress Reasonably Concluded That the Effects of Racial Discrimination Remain Prevalent in the Nation's Construction Industry.

The legislative record before Congress in 1998, the year it re-enacted the DBE program at issue here, *see* Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 113, far exceeded the record before Congress in 1977 and demonstrated that the effects of racial discrimination within the Nation's construction industry had dissipated little (if at all) over the preceding two decades. Both the District Court and the Tenth Circuit thoroughly reviewed the evidence before Congress in order to "smoke out" any illegitimate uses of race and found none. Both lower courts instead found ample evidence supporting Congress' conclusion that racially discriminatory barriers continue to exist in construction contracting on numerous fronts, and that limited race-conscious measures are therefore warranted to remedy that discrimination. Petitioner offers no basis for overturning the concurrent findings of the courts below.

1. Entry-Level Discrimination

The evidence before Congress, detailed in dozens of congressional hearings and reports, independent academic studies, and a voluminous Justice Department survey published in the Federal Register as *The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050-26,063 (1996), revealed two fundamental barriers

confronting minority entrepreneurs seeking to establish and build successful contracting businesses. First, minorities have faced a long and well-documented history of discriminatory exclusion from trade unions on the basis of race, which has prevented minorities from developing the technical skills and experience necessary to launch a successful business. *Id.* at 26,054. The exclusionary tactics employed by unions have included discriminatory selection criteria, discriminatory application of admissions requirements, and imposition of conditions (such as requiring new members to be related to an existing member) that effectively barred minorities from employment opportunities in the skilled trades. *Id.* at 26,055. The overwhelming evidence of racial discrimination by unions has led this Court to observe that "judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979).[2] A recent study conducted by a Yale University economist concluded that a history of "blocked access to the skilled trades is the most important explanation of the low numbers of minority and women construction contractors today." *The Compelling Interest*, 61 Fed. Reg. at 26,056 (citing Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989)).

The second principal barrier to the formation and development of minority businesses is the discriminatory denial of access to capital, a subject Congress has explored in depth through numerous hearings over the past ten years. *Id.* at 26,057 & n.86 (citing hearings). Academic studies confirm

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[2] *See* Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, Univ. of Wisconsin-Madison Journal of Intergroup Relations, Vol. XII, No. 4, pp. 21-27 (1984) (describing tactics used by unions to exclude black workers, including establishment of state licensing boards controlled by union representatives that discriminatorily denied licenses to black craftsmen).

the mountain of anecdotal evidence presented at these hearings documenting the discriminatory treatment minority entrepreneurs have received when applying for loans and credit. For example, a study comparing white-owned businesses with black-owned businesses with the same amount of equity capital found that white-owned businesses typically received loan amounts three times larger than those received by their black-owned counterparts. *Id.* at 26,058 (citing Bates, *Commercial Bank Financing of White and Black Owned Small Business Start-ups*, Quarterly Review of Economics and Business, Vol. 31, No. 1, at 79 (1991)). In the construction industry, the disparity was even more pronounced: white-owned firms received *50 times* as many loan dollars as black-owned firms with the same equity. *Id.* (citing Grown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992)).

Studies also show that, among firms with the same borrowing credentials, minority-owned firms are approximately 20% less likely to obtain venture-capital financing than comparable non-minority-owned firms, and 15% less likely to receive business loans. *Id.* A 1996 study in the Denver, Colorado, area, from which this case arises, found that African-Americans were three times more likely than whites to be rejected for business loans, and Hispanics were 1.5 times more likely than whites to be rejected for such loans. *Id.* (citing Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver* at v (1996)). Statistically significant disparities remained even after the authors of the study controlled for factors that might legitimately affect lending decisions, such as size, firm age, creditworthiness, and net worth. *Id.* This compelling body of evidence largely explains why the availability of minority-owned contractors

has been artificially depressed by marketplace discrimination.[3]

2. Ongoing Marketplace Discrimination Confronting Established Minority Contractors

Minority contractors who manage to overcome these obstacles to obtaining the skills and financing necessary to start their own businesses are frequently confronted with discrimination in attempting to bid for, obtain, and perform construction contracts. This ongoing discrimination adversely affects market access and utilization of minority contractors and seriously undermines the ability of minority contractors to compete on an equal basis for contracts. These discriminatory practices have been documented extensively in case law, regional disparity studies, and congressional hearings. *See The Compelling Interest*, 61 Fed. Reg. at 26,059 nn.100-01. Discussed below are a few examples of the forms such discrimination takes in markets throughout the country.

"Good-Old-Boy" Networks. Racial discrimination restricts the opportunities of minority contractors at various points in the bidding and contracting process. For example, much of the information about upcoming job opportunities is spread through informal "old-boy networks" that have deliberately excluded minorities, placing minority-owned businesses at a distinct competitive disadvantage. *The Compelling Interest*, 61 Fed. Reg. at 26,059-26,060 (citing National Economic Research Associates, *Availability and Utilization of Minority and Women Owned Business Enterprises at the Massachusetts Water Resources Authority* 74 (1990) (finding

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[3] Thus, any attempt at measuring the degree and pervasiveness of marketplace discrimination through a gross comparison of current availability to current utilization necessarily underestimates the true magnitude of disparities caused by such discrimination.

that exclusion from established networks makes it more costly for minorities to compete with non-minority-owned firms)).

Unequal Access to Bonding. Minority contractors also face racial discrimination in obtaining bonding, which is often a prerequisite to participating in public-sector construction contracts. State and local studies, as well as extensive anecdotal evidence presented at congressional hearings, have documented the fact that "minority businesses [are] significantly less able to secure bonding on equal terms with white-owned firms with the same experience and credentials." *Id.* at 26,060 & nn.117-20. Such discrimination can seriously undercut the ability of minority contractors to compete with non-minority-owned firms. Even a one or two percent differential in the bonding premiums charged to minority contractors can increase costs substantially and result in the difference between a winning and losing bid.

Bid Shopping. The construction industry has been and remains "a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work." *Id.* at 26,058. This system allows prime contractors to discriminate against minority subcontractors by simply refusing to accept low bids submitted by minority-owned firms, or by "shopping" a low bid submitted by a minority-owned firm to non-minority subcontractors willing to beat the bid. *Id.* at 26,059. Such bid shopping is generally considered unethical in the construction industry, but its use is not uncommon when a prime contractor seeks to replace a low-bidding minority contractor with a favored non-minority contractor. In the numerous disparity studies that have been undertaken by state and local governments over the past decade, there are virtually no documented instances in which minority subcontractors were the beneficiaries of bid shopping.

Price Discrimination by Suppliers. Minority contractors are frequently unable to obtain the same prices and discounts that suppliers offer to non-minority contractors, thereby

raising the costs incurred (and thus the bids submitted) by minority contractors. *The Compelling Interest*, 61 Fed. Reg. at 26,061. Indeed, one regional study found, in an incident illustrative of many others, that a white and minority contractor who had formed a joint venture were given such disparate quotes from the *same* supplier for the *same* project that the price differential would have added 40% to the final contract price had the minority contractor's price been used. *Id.* at 26,061 & n.125 (citing BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-20 (1992)).

Unfair Denial of Opportunity to Bid. It is also common for minority subcontractors to bid on private-sector jobs only to be told by a non-minority contractor that no bids from minority-owned firms were needed because no requirements for DBE participation applied to those contracts. To the extent that minority contractors derive a disproportionate share of their contract dollars from the highly competitive and low profit margin public-works arena, it undoubtedly reflects the daunting obstacles posed by such forms of marketplace discrimination on private construction contracts that remain beyond the reach of government affirmative-action programs.[4]

In addition to the direct evidence of racial discrimination discussed above, the legislative record before Congress contained a wealth of disparity studies conducted after this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Justice Department commissioned an analysis of 39 such studies from localities across the country, which revealed that, on average, minority-owned businesses

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[4] *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F. Supp. 2d 1042, 1074 (D. Colo. 2000) (noting testimony of minority and women contractors in the Denver area who were unable to obtain work on private construction projects due to negative stereotypes held by white male contractors). The city's appeal in the *Concrete Works* case has been held in abeyance by the Tenth Circuit pending the Court's decision in this case.

received only 59 cents for every dollar these firms would be expected to receive based on the number of qualified and available firms. *The Compelling Interest*, 61 Fed. Reg. at 26,061-26,062. Even in the area of construction subcontracting, which had the smallest disparity by industry sector, minority-owned firms received only 87 cents for every dollar they would be expected to receive. *Id.* at 26,062. Perhaps more significant were the studies documenting the effect on minority participation in public-sector contracting in those localities that abruptly ended their affirmative-action programs in the wake of *Croson*. In Philadelphia, for example, contract awards to minority- and women-owned businesses plummeted by 97% after the city discontinued its program in 1990; in Hillsborough County, Florida, awards to minority-owned businesses fell by 99%; and in Tampa, Florida, contract awards to black-owned businesses also dropped by 99%. *Id.* at 26,062 & nn.131-33. These figures graphically illustrate the extent to which minority-owned contractors remain effectively frozen out of public-sector contracting markets absent affirmative remedial measures designed to counteract the racially discriminatory forces otherwise at play.

3. Petitioner Offers No Basis for Overturning the Concurrent Findings of the Courts Below That Congress Acted in Furtherance of a Compelling Governmental Interest.

Petitioner argues here, as it did unsuccessfully below, that the evidence before Congress in 1998 somehow was not specific enough to support Congress' finding of discrimination in the Nation's construction industry. But petitioner's argument ignores the fact that, when Congress legislates in this arena, it need not "compil[e] the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (plurality opinion). Indeed, because Congress typically formulates rules with nationwide application, it is not required to make detailed

state-by-state or city-by-city findings of discrimination, nor could it realistically be expected to do so. "In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part).

Petitioner nonetheless resurrects the plea, rejected in *Fullilove*, that the Court "treat Congress as if it were a lower federal court . . . duty bound to find facts and make conclusions of law." *Fullilove*, 448 U.S. at 502 (Powell, J., concurring). For example, petitioner contends (without legal or scientific support) that Congress may not rely on statistical evidence of discrimination unless the statistical study is limited to contractors who "have the necessary expertise to perform the contracts in question," have met bonding requirements for those hypothetical contracts, and "are not otherwise engaged at the time" the studies are conducted. Pet. Br. 29. The notion that Congress must or even could obtain nationwide statistics on the utilization of minority contractors that take into account each of these factors is ludicrous. Congress is not charged with the task of deciding whether a single employer has engaged in discrimination in hiring, or even whether all employers in a particular locality have done so. When attempting to draw conclusions about the prevalence of discrimination within an industry on a national level, Congress must necessarily rely on statistical evidence at a much higher level of generality. Imposing on Congress the sort of evidentiary "requirements" suggested by petitioner would indeed render strict scrutiny "fatal in fact," in direct conflict with one of the core principles reaffirmed by this Court's first *Adarand* decision. *See* 515 U.S. at 237.

Nor is petitioner's reliance on *Croson* persuasive here. The evidentiary basis for Congress' decision to re-enact the DBE program was far more extensive than the evidentiary record this Court found inadequate in *Croson*. There, the city of

Richmond had before it "*no* direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Croson*, 488 U.S. at 480 (emphasis added). Instead, proponents of the set-aside relied merely on the disparity between the percentage of minorities in the city's general population and the percentage of the city's prime construction contracts that had been awarded to minority-owned businesses over the preceding five years, along with general findings of discrimination within the construction industry on a national level. *Id.* at 479-80. The Court held this evidence insufficient to support the city's set-aside because the legislative record contained neither evidence of racial discrimination specifically tied to the Richmond construction industry, nor evidence of the disparity between the level of participation by minority contractors in public construction projects and the number of minority contractors in the city qualified to undertake such work. *Id.* at 502, 505.

Here, Congress had before it abundant evidence from localities throughout the country demonstrating that racial discrimination remains prevalent in the construction industry. In addition, the record before Congress made clear that the lingering effects of past discrimination pose significant barriers to the ability of minority contractors to compete on a level playing field for public-sector construction contracts. That evidence provided a more than sufficient basis on which Congress could conclude that "the problem was national in scope." *Fullilove*, 448 U.S. at 478 (plurality opinion); *cf. Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding amendments to Voting Rights Act of 1965 that extended ban on literacy tests nationwide). Yet, as discussed in greater detail below, the regulations implementing the DBE program do not rely on inflexible percentages applicable without regard to local market conditions. Indeed, responding to this Court's criticism of the Richmond ordinance in *Croson*, the

regulations expressly require state and local governments to set goals for DBE participation that are directly tied to the number of "ready, willing and able" DBEs in the local market. 49 C.F.R. § 26.45.

II. THE REVISED DBE PROGRAM IS NARROWLY TAILORED TO SERVE CONGRESS' COMPELLING INTEREST IN REMEDYING THE EFFECTS OF RACIAL DISCRIMINATION.

A. Race Is Merely One of Several Factors Determining Who Will Be Awarded a Particular Contract.

The Court's cases indicate that remedial measures in which race is the "sole criterion in an aspect of public decisionmaking" are far more problematic from a narrow-tailoring standpoint than programs in which race is merely one of several factors taken into account. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 508 (1989); *see Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 317-18 (1978) (opinion of Powell, J.). There are of course contexts in which race must play the decisive role in order to remedy the effects of past discrimination, as in the school desegregation cases. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). But in general the Court has viewed such measures skeptically because, at least in contexts where public decisionmaking involves an assessment of individual qualifications, a regime in which race alone is determinative (e.g., quotas) may force the decisionmaker to choose individuals who would not otherwise be deemed qualified. *See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495-96 (1986) (O'Connor, J., concurring in part and dissenting in part). Conversely, programs or decrees in which race is not the dispositive factor have been viewed more favorably, because they permit a sufficiently individualized inquiry into the respective qualifications of each individual applicant. *See, e.g., Bakke*, 438 U.S. at 315-18 (opinion of

Powell, J.); *cf. Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 636-37 (1987) (gender).

The DOT's revised DBE program does not result in the allocation of public-sector construction contracts based solely (or even predominantly) on race. Unlike the ordinance invalidated in *Croson*, which allocated 30% of the funds of each contract to subcontractors from specified racial groups, 488 U.S. at 477, the DOT's program merely sets a nationwide goal that 10% of federal funds be used to purchase goods and services provided by disadvantaged business enterprises. This aspirational goal is not itself a racial classification at all (since it is based on disadvantage) and thus is subject to no more than rational basis review. *See Adarand*, 515 U.S. at 212-13.

But even if the program simply used disadvantage as a direct proxy for race (which, as will be seen below, it does not), the program would still not employ race as the sole criterion for deciding which contractor will obtain a particular subcontract. As implemented by the DOT's revised regulations, the 10% national goal is not binding on any state or local recipient of federal funds, or on any prime contractor who seeks to bid on a particular contract. Instead, the DBE program requires state and local recipients of federal funds to set their own goals for DBE participation based on local market conditions -- specifically, on "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts." 49 C.F.R. § 26.45(b). Recipients of DOT funds may not simply rely on the 10% national goal, but must instead set a goal reflecting "the level of DBE participation [the recipient] would expect absent the effects of discrimination." *Id.*

Besides the flexibility provided in the setting of overall program goals, the regulations ensure that work on a particular contract is not allocated "according to inflexible percentages solely based on race or ethnicity." *Fullilove*, 448

U.S. at 473 (plurality opinion). The regulations expressly state that recipients of DOT funds "must meet the maximum possible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a). The regulations permit recipients to use "contract goals" -- i.e., provisions requiring a prime contractor to use DBE subcontractors for a set percentage of the work -- only when the recipient's overall goal of DBE participation cannot be met through race-neutral means. § 26.51(d). And, even when recipients use contract-specific goals, they are not required to set such a goal on every DOT-assisted contract, or to set the goal for a particular contract at the same percentage as the overall goal. § 26.51(e)(2). Instead, the regulations state that recipients must tailor the contract goal to the local market conditions relating to that specific contract: "The goal for a specific contract may be higher or lower than [the] percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract." *Id.*

Finally, even where a contract goal has been set, a prime contractor who submits the lowest bid may not be denied the contract merely because the contractor failed to satisfy the specified level of DBE participation. The regulations state that a recipient of DOT funds "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal," so long as the bidder made good-faith efforts to locate qualified DBEs. 49 C.F.R. § 26.53(a)(2). The regulations make clear that, in making good faith efforts to meet a contract goal, "[p]rime contractors are not . . . required to accept higher quotes from DBEs if the price difference is excessive or unreasonable." 49 C.F.R. Pt. 26, App. A, § IV(D)(2). And a prime contractor is not required to accept an unqualified DBE, so long as the prime contractor has sound reasons for concluding that the DBE is not capable of performing the work in a satisfactory manner. § IV(E).

These provisions, many of which were added specifically to address the narrow-tailoring concerns of this Court's first *Adarand* decision, plainly preclude race from acting as the sole criterion in determining who is awarded a particular government contract. The current DBE program thus stands in marked contrast to the program struck down in *Croson*. There, the city of Richmond imposed what this Court termed a "rigid racial quota," 488 U.S. at 499, which denied non-minority citizens "the opportunity to compete for a fixed percentage of public contracts based solely upon their race," *id.* at 493 (plurality opinion).

As explained above, in determining whether race is the sole criterion used in the public decision-making at issue here, the relevant "decision" is the actual award of a public construction contract, which the DBE program influences by establishing an aspirational goal based on disadvantage, not race. The only aspect of the DBE program that is actually race-conscious involves the presumption of disadvantage granted to certain minority-owned businesses. But, even as to this aspect of the program, individuals are not granted or denied status as DBEs "based solely upon their race." *Croson*, 488 U.S. at 493 (plurality opinion).

This is true for several reasons. First, participation in the DBE program is not limited to those of specified racial backgrounds. Business owners who demonstrate by a preponderance of the evidence that they are both socially and economically disadvantaged may be certified as DBEs, regardless of their race. 49 C.F.R. § 26.67(d). The DOT regulations make clear that, besides race or gender, social disadvantage can stem from any "objective distinguishing feature" (such as disability or long-term residence in rural areas isolated from the mainstream of American society) that has exposed individuals to "cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 49 C.F.R. Pt. 26, App. E, § I.

Members of designated minority groups are presumed to be socially and economically disadvantaged, but that presumption is rebuttable. 49 C.F.R. § 26.67(a). Thus, any person may contest whether a particular minority business owner is in fact socially or economically disadvantaged, and if the certifying agency determines that the minority business owner is not both socially and economically disadvantaged, that individual's firm will be disqualified from participating in the DBE program. § 26.87. Moreover, reliance on the presumption of disadvantage alone is not sufficient to establish eligibility for the DBE program. All minority business owners must submit a signed statement certifying under penalty of perjury that they are in fact socially and economically disadvantaged, § 26.67(a)(1), as well as a signed, notarized statement of net worth, § 26.67(a)(2). If the minority business owner's personal net worth (as defined by the regulations) exceeds $750,000, the presumption of economic disadvantage is rebutted and the individual's firm is not eligible to participate in the DBE program. § 26.67(b)(1), (4). Collectively, these provisions afford a sufficiently individualized inquiry into disadvantage to ensure that use of the presumption does not render the DBE program either over- or under-inclusive.

The Court has previously upheld the use of similar presumptions in analogous contexts. For example, in upholding provisions of the Voting Rights Act of 1965, the Court held that, pursuant to its enforcement powers under Section Two of the Fifteenth Amendment, Congress could presume that any State or political subdivision employing a literacy test was using that test in a racially discriminatory manner if less than 50% of the voting-age residents were registered to vote as of November 1, 1964. *South Carolina v. Katzenbach*, 383 U.S. 301, 317, 329 (1966). The Court held that the termination procedures afforded by the Act, which allowed a State or political subdivision to terminate statutory coverage by proving that it had not used literacy tests in a

racially discriminatory manner in the preceding five years, were sufficient to avoid any danger of overbreadth. *Id.* at 331-32. And the Court has held in Title VII cases that proof of a pattern and practice of racial discrimination in hiring gives rise to a rebuttable presumption that each member of the class who unsuccessfully applied for a position is entitled to relief, subject to proof by the employer that its refusal to hire a particular individual was not based on race. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359 & n.45, 362 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976). The presumption of disadvantage afforded by the DOT's regulations operates no differently from the presumptions upheld in these cases, and affords the same protection against overbreadth by allowing anyone aggrieved by the presumption to prove that the presumption is unwarranted.

B. The DBE Program Is Narrowly Tailored to Remedy Ongoing Effects of Identified Forms of Discrimination in the Construction Industry.

1. The DBE Program in Part Remedies Effects of Entry Level Discrimination.

The major component of entry level discrimination that has been significantly documented through academic research is unequal access to capital. The most direct remedy for this particular entry-level form of discrimination would undoubtedly focus on boosting access to start-up and working capital for minorities in the construction industry. However, there can be no doubt that this barrier is also somewhat reduced through a narrowly tailored subcontracting goals program as authorized under the DBE program. The enhancement to subcontract opportunities for DBE firms, in part, creates new employment opportunities for minorities.[5]

[5] Recent academic research by Dr. Timothy Bates has confirmed that minority-owned businesses (many of which qualify for the DBE program) tend to hire significantly higher proportions of minorities in their labor forces than do non-minority owned firms.

Furthermore, enhancement of subcontracting opportunities for minority-owned construction firms is a necessary component to any successful remedy that is directed towards increasing access to capital. For several decades, the federal government has used race-neutral small business loan programs through the SBA to boost access to capital for smaller and newer businesses. However, these efforts have failed miserably to eliminate the significant disparity that exists in access to credit and capital for minority-owned businesses. This is because "smallness" and "newness" are not the only factors that limit capital access for minority-owned businesses. One essential component of any lender's analysis of a loan application is whether the loan applicant has sufficient cash flow and revenues to repay the loan. Because the DBE program increases subcontract opportunities and cash flow for those firms that have been disadvantaged by discrimination, their access to capital through small business lending programs (and even standard commercial loans) is also enhanced.

2. The DBE Program, in Part, Remedies the Effects of Various Forms of Discrimination in the Construction Industry.

As elaborately documented in the congressional record, there are many forms of ongoing marketplace discrimination in the construction industry that adversely affect the ability of established minority contractors to compete for contracts. There are several forms of marketplace discrimination that are remedied, in part, by the enhanced opportunities for subcontracting provided by the DBE program.

(a) "Good-Old-Boy" Networks

One of the most debilitating effects of the good-old-boy network that excludes minority-owned contractors from

knowledge about private sector jobs and subcontracting opportunities is that they are altogether left out of the bidding process for subcontracts. In private sector construction contracts, unlike government contracts, a prime contractor is often under no obligation to competitively bid out subcontracted portions of the work. Where there is competition for such contracts, prime and subcontract bids are frequently by invitation only. There have been many instances where minority contractors have specifically requested an opportunity for such invitations to bid on private sector contracts only to be completely ignored by the prime contractors. This private sector discrimination is particularly significant because it is estimated that virtually 90% of all commercial activity occurs on non-government funded contracts.

The DBE program helps to counteract the operation of the good-old-boy network in two ways. First, it strongly encourages solicitation of bids by prime contractors from minority subcontractors on government construction projects. Second, by encouraging prime contractors to work with DBE subcontractors, it helps to introduce new blood into an industry that otherwise would have no opportunity for establishing such working relationships through traditional social interaction. Social barriers from race remain fairly high in the construction industry. In addition, the increased market access and revenues that DBEs obtain through the DBE program partially offset revenues lost by DBEs from discriminatory barriers on more lucrative private sector jobs. Revenue and profit growth are essential to building increased capacity and price competitiveness.

(b) Unequal Access to Bonding

Discrimination that results in DBEs being unable to obtain bonds or in paying higher rates for bonds also undermines their ability to compete for subcontracts. While the race-neutral approach of increasing the dollar thresholds for

bonding requirements helps to ameliorate this problem on the smallest of contracts, it does little to address the lack of bonding track record for DBEs that thwarts their ability to become a prime contractor where bonding is required. Similarly, for those larger contracts where subcontractors are required to post bonds, the cost differential in bonding rates for DBEs of only one or two percent can frequently be the difference between winning and losing a bid.

However, the DBE program helps to level the playing field by enabling recipients to encourage prime contractors to assist DBE subcontractors in obtaining bonds, and also in helping DBE subcontractors develop a performance track record that they would otherwise not likely develop.[6]

(c) Price Discrimination by Suppliers

One of the most devastating forms of discrimination in the construction industry is price discrimination by suppliers. Suppliers that conspire with the competitors of DBE firms to quote them better prices for the same quantity of materials of like grade and quality than they offer to DBE firms can determine the outcome of a bid. Depending on the type of construction, materials and supplies can account for the majority of the cost of an overall bid.

The DBE program helps to undermine the chances for such successful collusion by increasing the chances for DBE contract participation. When suppliers realize that there is a greater likelihood that a DBE subcontractor may win a contract, competitive pressures to sell supplies for that portion of the job increase the likelihood that one or more suppliers will quote the DBE subcontractor a fair price.

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[6] In addition to capital and credit, bonding companies typically consider competence as measured by a performance track record on jobs of a certain size in deciding whether to issue a bond to a contractor, and at what rate.

(d) Unfair Denial of Opportunities to Bid

Several disparity studies have reported increased resistance from white-owned prime contractors to accepting bids from minority-owned subcontractors once affirmative action remedies were no longer in effect. Again, the DBE program directly addresses the effects of this form of discrimination by enabling recipients to require affirmative good-faith efforts on the part of prime contractors to solicit bids from DBE subcontractors, under appropriate circumstances.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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